Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Richard C.O. Rezie
Gallagher, Sharp, Fulton
& Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310
Attorneys for Petitioner.

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1447(d) absolutely prohibits appellate review of an order remanding a cause from a District Court to a State court, even where such order of remand is not based to a fair degree on a good faith construction of the jurisdictional statute.

2. Whether 28 U.S.C. § 1447(d) absolutely prohibits appellate review of an order remanding a cause from a District Court to a State court, even where such remand is made for reasons not sanctioned by 28 U.S.C. § 1447(c).

3. Whether 28 U.S.C. § 1447(d) absolutely prohibits appellate review of an order remanding a cause from a District Court to a State court, even where such remand is made in contravention of the judicial power flowing from the Constitution of the United States and vested in the District Courts by Congress.

4. Whether an order by a District Court applying the 28 U.S.C. § 1332(c)(1) direct action proviso to abrogate diversity jurisdiction, where such proviso is inapplicable by ample precedent and Congressional intent, is erroneous and appealable under 28 U.S.C. § 1447(d).

5. Whether one has a right under the Constitution of the United States to proceed in a Court of the United States where Congress has vested that court with the judicial power delegated by the Constitution.

PARTIES TO THE PROCEEDING

Federal Insurance Company
15 Mountain View Road
Warren, NJ 07059
represented by:
D John Travis (0011247)
Seventh Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310 - Telephone
(216) 241-1608 - Telefax

Kenneth R. Jones and Mary B. Jones
13571 Sousa St.
N. Lawrence, Ohio 44666
represented by:
Robert E. Soles, Jr., Esq.
John L. Juergensen, Esq.
Black, McCuskey, Souers & Arbaugh
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702
(330) 456-8341 - Telephone
(330) 456-5756 - Telefax

American Motorists Insurance Company
1 Kemper Drive
Long Grover, IL 60049-0001
represented by:
Ronald A. Rispo, Esq.
Robert E. Goff, Jr., Esq.
Therese P. Joyce, Esq.
Weston, Hurd, Fallon, Paisley & Howley

2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 241-6602 - Telephone
(216) 621-8369 - Telefax

Energy Insurance Bermuda Ltd.
P.O. Box HM 2064
Hamilton HM HX, Bermuda
represented by:
Mason Evans, Esq.
David Bloomfield, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215
(614) 227-2000 - Telephone
(614) 227-2100 - Telefax

CORPORATE DISCLOSURE STATEMENT OF PETITIONER FEDERAL INSURANCE COMPANY

Federal Insurance Company is wholly owned by The Chubb Corporation. The Chubb Corporation owns 100% of Federal Insurance Company's stock. The Chubb Corporation is publicly traded on the New York Stock Exchange.

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The decision of the Sixth Circuit Court of Appeals: *Jones v. Federal Ins. Co.*, No. 01-4323 (6th Cir. Mar. 26, 2002) (App. A, pp. 1a-5a.); the decision of the District Court: *Jones v. Federal Ins. Co.*, No. 5:01CV1616 (N.D. Ohio Nov. 14, 2001) (App. B, pp. 6a-7a.); and the order of remand filed in this case but, apparently, intended for another matter: *Verhovec v. Wausau Ins. Co.*, No. 5:01CV662 (N.D. Ohio Nov. 14, 2001) (App. C, pp. 8a-9a).

JURISDICTION

The order of the United States Court of Appeals was entered on March 26, 2002 and found that it lacked jurisdiction, by application of 28 U.S.C. § 1447(d), to review the remand order entered by the District Court. Remand orders are generally final and appealable as set forth by this Court in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 714-15 (1996). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review final orders of the Circuit Courts. *United States v. Shipp*, 203 U.S. 563, 573 (1906) ("But even if the Circuit Court had not jurisdiction to entertain [the] petition, and this court has no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law."). Whether the 28 U.S.C. § 1447(d) general prohibition on appellate review of remand orders is applicable to a specific order is the subject of this appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 1 and § 2, cl. 1-2:

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1447(c) and (d) provide:

"(c) A motion to remand the case on the basis of any defect

other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

28 U.S.C.§ 1332(c)(1) provides:

"[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

STATEMENT OF THE CASE

This case concerns an out-of-state insurer's removal of the cause to the United States District Court based on diversity

jurisdiction. The matter was filed in Stark County, Ohio Court of Common Pleas. (App. F at p. 36a.) Federal properly removed the cause to the United States District Court for the Northern District of Ohio based upon diversity of citizenship. (App. F, pp. 29a-46a.)

Federal is an Indiana Corporation with its principal place of business in New Jersey, and plaintiffs are citizens of Ohio. (App. F at pp. 30a, 37a.) The amount in controversy exceeds $75,000. (App. F at pp. 31a, 42a.) The District Court found that it lacked diversity jurisdiction based solely upon the application of the direct action proviso of 28 U.S.C. § 1332(c)(1), 78 Stat. 445 (1964) (hereinafter often referred to as the "direct action proviso") by which the citizenship of an insured is imputed to the insurer in a "direct action" on a policy of "liability" insurance. (App. B at p. 7a.)

The District Court's decision is representative of a new line of cases being decided in the Northern District of Ohio which creates a "new and murky jurisdictional quagmire[.]" *Villa v. Michigan Mut. Ins. Co.*, No. 1:01CV1707, 2002 U.S. Dist. LEXIS 9992, at *1 n.1 (N.D. Ohio Mar. 20, 2002). A clear spilt of authority has developed in the Northern District. Some judges in the District hold that federal jurisdiction exists in cases identical to this matter. Other judges in the District do not. The reasoning of those who decline to accept jurisdiction represents a significant departure from the precedent of all other judicial districts interpreting the direct action proviso. Federal courts outside the Northern District of Ohio (including the Southern District of Ohio) had been in accord that the direct action proviso applies only to suits sounding in tort liability filed directly against the tortfeasor's insurer where, due to peculiarities of state law, the tortfeasor need not be joined as a defendant.

Plaintiffs' claims in the case at bar are not direct actions against a tortfeasor's insurer. Rather, they are based upon a controversial decision of the Supreme Court of Ohio. In *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 85 Ohio St. 3rd 660 (1999), the Supreme Court of Ohio analyzed the definition of "Who Is An Insured" in the uninsured/underinsured motorist provisions of a corporation's insurance policy. *Id.* at 663. The Supreme Court found the definition ambiguous and, interpreting the ambiguity against the insurer, found that employees of the corporation were afforded uninsured/underinsured motorist coverage under their employer's policy for accidents outside the course and scope of their employment in non-company owned vehicles. *Id.* at 664. This and other insurance opinions of the Supreme Court of Ohio have spawned inconsistent and contradictory rulings across Ohio concerning uninsured/underinsured motorist coverage under employer's policies.

A plethora of "*Scott-Pontzer*" claims has followed. Plaintiff Kenneth R. Jones presented his *Scott-Pontzer* claims as an employee of American Electric Power, Co., Inc., Federal's named insured. American Electric Power is an Ohio corporation. Mr. Jones was injured in an accident with an allegedly uninsured/underinsured tortfeasor while riding his own motorcycle. (App. F at p. 38a.) Although his accident and injuries had nothing to do with his employment, pursuant to *Scott-Pontzer*, Mr. Jones asserts that he is an "insured" of Federal and entitled to recover under the Federal policy insuring American Electric Power. To that end, he filed suit in an Ohio state court.

Federal exercised its right to remove the action to the United States District Court, which was invested with the diversity jurisdiction set forth in Article III, Sections 1 and 2 of

the United States Constitution by act of Congress. This action should now be pending in District Court as a properly removed dispute between citizens of different states pursuant to the Constitutional power vested by Congress in that Court. The District Court, however, sought to find a way to remand the matter to state court, first issuing an order to show cause why the remand should not occur (App. D, pp. 10a-19a), and later interpreting the direct action proviso in 28 U.S.C. § 1332(c)(1) in a novel and strained manner (App. B, pp. 6a-7a). The District Court imputed American Electric Power's Ohio citizenship to Federal, even though the case against Federal was not a direct action on a policy of liability insurance. The District Court therefore concluded that it lacked diversity jurisdiction and remanded the case to State court based upon the policies it found to be embodied in the direct action proviso.

Federal timely appealed the District Court's remand order to the Court of Appeals for the Sixth Circuit, which found that it lacked jurisdiction to review the remand order because of the limiting provision of 28 U.S.C. § 1447(d), 63 Stat. 102 (1949) (hereinafter often referred to as "Section 1447(d)"). Federal argued to the Sixth Circuit that where Congress provides for jurisdiction, such jurisdiction flows from Article III, Sections 1 and 2 of the United States Constitution and, therefore, that a right secured by the United States Constitution had been violated. Federal also argued that the District Court's remand order had violated its rights to Equal Protection and Due Process of Law under the United States Constitution. The Sixth Circuit ruled that such constitutional considerations were not sufficient to afford it jurisdiction to review, a conclusion that puts the Sixth Circuit in conflict with decisions of the Third Circuit.

Federal also asserted that the District Court's decision

was not based, to a fair degree, upon a good faith interpretation of the direct action proviso. Federal argued that the District Court's decision was driven by its own public policy analysis, not by a fair reading of the language of either Section 1332(c)(1) or precedent interpreting it. Thus, the remand was not based on a lack of subject matter jurisdiction, the applicable reason for remand sanctioned by 28 U.S.C. § 1447(c) (hereinafter often referred to as "Section 1447(c)"). The Sixth Circuit concluded simply that "[t]he legal holding with which the defendant takes issue was in the context of the larger jurisdictional determination." (App. A at p. 4a.) Having reached this conclusion, the Sixth Circuit declined to analyze or review the basis of the District Court's determination. The refusal to make even a limited inquiry into the basis of the District Court's order of remand places the Sixth Circuit in conflict with decisions of the Tenth, Third, and Fourth Circuits.

REASONS FOR GRANTING THE WRIT

The issues presented by this case are issues about which the Circuit and District Courts disagree. First, whether the District Court's remand order is reviewable and the extent of the analysis required to determine reviewability under Section 1447(d) are issues about which a conflict exists between the Circuits. While the Sixth Circuit declined here to delve into the basis of the remand, the Fourth and Tenth Circuits review not only the reasons for remand stated in the order, but also its underlying legal basis to determine if the remand order is within the Section 1447(d) bar to appellate review. The Sixth Circuit's position is in conflict with that of the Fourth and Tenth Circuits on this issue.

Second, the Tenth, Sixth, and Third Circuits are also in conflict regarding whether the Section 1447(d) bar on review is

absolute where a District Court's remand order lacks a good faith basis, from a fair reading of a jurisdictional statute, as is mandated by Section 1447(c).

Third, the Fourth, Third, Tenth and Sixth Circuits are also in conflict as to whether review of non-routine jurisdictional determinations, such as Constitutional issues implicating the right to proceed in a Court of the United States and one's rights to Due Process and Equal Protection, is forbidden by the Section 1447(d) bar to review.

The Northern District of Ohio—in this case and others—has announced a new interpretation of the direct action proviso. This new interpretation has split even the District and is in conflict with all other federal courts that have passed upon this issue. Should this novel interpretation of the direct action proviso be followed in other jurisdictions, diversity jurisdiction would be destroyed in virtually all situations where an insured sues his or her insurer (or alleged insurer) and the cause is either removed to, or originally commenced in, federal court. The exception will devour the rule, and judicial power created in the Constitution will be contravened.

Should the remand order of the District Court and the finding of no appellate jurisdiction by the Sixth Circuit be allowed to stand, District Courts will have unfettered discretion in remanding cases, so long as they state somewhere in the order of remand that they are without subject matter jurisdiction. This is, in fact, what occurred here. Other federal courts have uniformly held that the direct action proviso does not apply to all actions filed against insurers—the proviso was intended to apply only to direct actions authorized by particular state statutes and arising out of policies of liability insurance. The District Court here employed the proviso with respect to a claim

that is neither a direct action nor one predicated upon liability insurance. The District Court's analysis is in conflict with the holdings of other federal courts. Ignoring Congressional intent and precedent, the District Court remanded this action under circumstances which call for at least some level of appellate review.

The Section 1447(d) bar on appellate review of an order of remand is not absolute. This Court and several Circuits have recognized exceptions to it in decisions which are now in conflict with the Sixth Circuit's analysis herein. The fundamental question is whether the ability to remove to and proceed in federal court, once set forth by Congress, is a statutory or a Constitutional right. Defining the scope (and the limitations) of the Section 1447(d) bar on appellate review of remand orders is both intertwined with the Constitutional issue of jurisdiction and an issue in its own right demanding this Court's supervising power. The Tenth and Third Circuits have found the Section 1447(d) bar to review to be inapplicable where the decision of the District Court is not based to a fair degree on subject matter jurisdiction, is not supported by a good faith finding, or presents constitutional issues. The Tenth, Third, and Fourth Circuits also conduct a plenary review of the District Court's remand order to determine the District Court's rationale.

This Court has held that policy-based remands, such as remands ordered merely to expedite the proceedings, are not a proper basis for remand under Section 1447(c) and thus not within the purview of the Section 1447(d) bar on review. The Sixth Circuit, however, has concluded that when a District Court makes even a perfunctory statement that it lacks subject matter jurisdiction, appellate review is barred by Section 1447(d). This analysis is in conflict with the decisions of this

Court and three Circuits.

For over two hundred years, the Constitution and Congress have recognized the importance of diversity jurisdiction to alleviate even the apprehension of local prejudice. The framers of the Constitution either felt such prejudice was a real possibility or indulged such fears in providing for diversity jurisdiction in the Constitution. Now, insurers are to be barred from federal court where they are sued by local insureds or would-be insureds—precisely where diversity jurisdiction is most needed. Insurers will be denied a right afforded to all others and, if the remands are unreviewable, will have no recourse whatsoever. The dire consequences for the insurance industry and the rights of all those who wish to proceed in federal court cannot be overstated. The Petition should be granted.

I. Certiorari should be granted to resolve the conflict as to whether a Circuit Court may review an order of remand to determine whether such order was based to a fair degree on a good faith finding that the District Court lacked subject matter jurisdiction or whether the District Court acted outside the scope of Section 1447(c).

The Circuits are in conflict as to the scope of review applicable in determining whether a remand is within the Section 1447(d) prohibition on review. Assuming that the basis of a remand order is reviewable to some degree, the Circuits also disagree as to whether a remand based on the public policy underlying a jurisdictional statute is reviewable.

As this Court has previously "explained in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), § 1447(d) must be read *in pari materia* with § 1447(c), so that

only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." (Parallel citations omitted). *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). This holding implicitly mandates that the Circuit Courts review remands to determine if they are, in fact, based on a reason sanctioned by Section 1447(c). The only reason sanctioned in Section 1447(c) applicable herein is lack of subject matter jurisdiction.

The Tenth Circuit has held that "[m]ere mention of § 1447(c) or the 'magic words' of subject matter jurisdiction [] do not automatically render a remand order nonreviewable under § 1447(d)." *Flores v. Long*, 110 F.3d 730, 732 (10th Cir.1997). Further, the Fourth Circuit has held that "'powerful policy considerations and persuasive decisional authority support [the court of appeal's] authority—and responsibility—to look past contextually ambiguous allusions and even specific citations to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand.'" *Id.*, quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996).

The standard of review employed by the Sixth Circuit herein is substantially more deferential, if not nonexistent, than that employed by the Fourth and Tenth Circuits. The Sixth Circuit never analyzed the District Court's decision to determine its basis or its Constitutional validity. The Sixth Circuit reasoned only that the District Court had "applied a jurisdictional statute" and, concluding that the District Court had purported to do so, did not even attempt to determine whether the District Court's decision was based, to a fair degree, on a good faith interpretation of the direct action proviso. (App. A at p. 4a.)

Nor did the Sixth Circuit analyze the constitutional issues presented, concluding only that they were not of sufficient "magnitude" to "warrant ignoring the prohibition of § 1447(d)." (App. A at p. 5a.) The Sixth Circuit's review was limited to whether the District Court used the "magic language" of jurisdiction and is thus in conflict with the standard of review utilized by the Tenth and Fourth Circuits. This Court's supervisory power is needed to rectify the disparate standards of review employed by the Circuits.

Had the Sixth Circuit utilized the standard of review used in other Circuits, it would have found the statutory basis for the District Court's remand to be lacking. Rather than basing its decision on the direct action proviso, the District Court based its decision to remand on the public policy it believed underlies the proviso. The District Court explicitly found that the direct action proviso was intended to apply where "state laws [] created diversity where it would not have existed before." (App. B at p. 7a (adopting the rationale and analysis set forth in *Kormanik v. St. Paul Fire & Marine Ins. Co.*, No. 5:01CV02122, 2001 U.S. Dist. LEXIS 23929 (N.D. Ohio Oct. 19, 2001)) and App. D at p. 15a (setting forth the analysis and rationale so incorporated).) But *Scott-Pontzer* is not a state law, it is a judicial decision. It does not create diversity, but is the basis for a cause of action. The District Court found only that *Scott-Pontzer* was "[m]uch like" the direct action statues in that it "has resulted in a burgeoning number of cases," being removed or brought in federal court based on diversity of citizenship. (*Id.*) The District Court then based its jurisdictional decision upon the court's own public policy view; that due to "the unsettled nature of the law . . . . [i]t makes far more sense for a state court to address these unsettled issues[.]" (*Id.*)

Other judges in the Northern District of Ohio have

recognized that applying the direct action proviso to actions by an insured against his or her own putative insurer is based on public policy rather than a principled interpretation of the direct action proviso. *Dolly v. Old Republic Insurance Co.*, No. 5:00CV1685, 2002 U.S. Dist LEXIS 9036, at *9-10 (N.D. Ohio May 8, 2002) ("Given the problem that *Scott-Pontzer* cases are becoming for federal courts, this is an attractive theory since, like the cases where the Ohio citizenship of the employer/insured destroys diversity, the Ohio citizenship of the employee/insured would also destroy diversity and require either remand or dismissal.")

Thus, another conflict exists between the Sixth Circuit and the decisions of this Court and the other Circuits. The Tenth Circuit has held that a remand order is appealable under 28 U.S.C. § 1447(d) if it is not "'based to a fair degree upon the [district] court's finding that it lacked subject matter jurisdiction to hear the case,'" *Dalrymple v. Grand River Dam Authority*, 145 F.3d 1180, 1184 (10th Cir. 1998), *cert. denied*, 525 U.S. 1069 (1999), quoting *Flores*, 110 F.3d at 733, or was not "made in good fath," *Dalrymple*, 145 F.3d at 1184, *Flores*, 110 F.3d at 733. *See also Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) ("The district court need not be correct in its determination that it lacked subject matter jurisdiction [] so long as it made that determination in good faith.").

The Sixth Circuit never reviewed the District Court's remand order to determine if it had a good faith basis or was based, to a fair degree, on the Section 1332(c)(1) proviso. The Sixth Circuit's conclusion that it lacked jurisdiction to review the basis of the remand order to determine if the order was within one of the reasons sanctioned by Section 1447(c) is in conflict with the standard employed by other Circuits. Had the Sixth Circuit used the proper standard of review, it would have

found the District Court's order appealable and erroneous.

II. Certiorari should be granted to address the split in the Circuits regarding whether Section 1447(d) applies to bar appeal where a non-routine determination is at issue.

The Third and Fourth Circuits have carved out an exception to the Section 1447(d) bar to review where the decision of the District Court is not of the type usually made in the context of a remand. As a subspecies of this exception, the Third Circuit has held that review of a remand order is not prohibited where constitutional issues are raised.

The Third Circuit has held that the where the "ruling which triggered the remand order, was not the type of jurisdictional determination routinely and regularly made pursuant to § 1447(c), [the] review of the district court's remand order [is] not barred by § 1447(d)." *Carr v. American Red Cross*, 17 F.3d 671, 682 (3d Cir. 1994). The Third Circuit went on to state that where a remand violates an "express Congressional specification[] of jurisdiction, we conclude[] that we [can] review the [] remand order[]." *Id.* Constitutional issues hold a special place in the Third Circuit's analysis as "courts will not impose restrictions on access to appellate review [of constitutional issues] unless Congress has expressed that intent by clear and convincing evidence." *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 845, (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) citing, *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Third Circuit has "not [found] clearly expressed congressional intent which would preclude review" of constitutional issues raised in a remand order based upon want of subject matter jurisdiction. *Id.*

For instance, in *Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir. 1993), *cert. denied*, 510 U.S. 817 (1993), the court of appeals held that "the district court's remand order was reviewable because the district court's subject matter jurisdiction, within the meaning of § 1447(c), was established conclusively by the Attorney General's certification...." *Carr*, 17 F.3d at 682. Because jurisdiction was conclusively established, the District Court's erroneous remand order stood "'in marked contrast to the normal jurisdictional decisions made in connection with remand.'" *Carr*, 17 F.3d at 682, quoting *Aliota*, 984 F.2d at 1357. The Third Circuit found it reviewable. *Id.*; *accord Borneman v. United States,* 213 F.3d 819, 824-26 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

The Sixth Circuit held that Federal's arguments were not of sufficient constitutional "magnitude" to warrant an exception to Section 1447(d). (App. A at p. 5a.) The Sixth Circuit never endeavored to determine if the District Court's ruling was a routine determination, apparently failing to recognize any exception to Section 1447(d)'s restriction on review of an order of remand. Thus, the Sixth Circuit's decision is in conflict with those of the Third and Fourth Circuits. This presents both a Constitutional and a statutory issue upon which the Circuits are in conflict. Thus, the Petition should be granted.

III. Certiorari should be granted to resolve the conflict as to whether the Section 1332(c)(1) direct action proviso applies to suits by putative insureds against insurers seeking a determination that they are entitled to coverage.

The judicial power is created by the Constitution, but Congress decides where and when to vest the power. Thus, as discussed in the fourth reason for granting the Petition, Federal has a Constitutional right to proceed in federal court where

Congress has unambiguously vested jurisdiction in the federal court. The District Court's remand order in this case is in conflict with the decisions of many other District and Circuit Courts. The order is in conflict with those of other judges within the Northern District of Ohio, which is split on the issue. The position embraced by the District Court's remand represents a fundamental change in the nature and application of diversity jurisdiction under 28 U.S.C. § 1332. This issue itself presents a compelling reason for this Court to accept jurisdiction.

The District Court applied 28 U.S.C. § 1332(c)(1) to impute the citizenship of the named insured corporation to its insurer, thus destroying diversity. The key phrases in the direct action proviso, as applicable here, are whether this is a "direct action" and whether uninsured/underinsured motorist coverage is "a policy or contract of liability insurance." If either of these prerequisites are not met, the proviso does not apply and diversity jurisdiction unequivocally exists.

Other courts have uniformly held that when one sues a company alleged to be one's own insurer, the action is not a "direct action" within the meaning of 28 U.S.C. § 1332(c). *Accord State Farm Ins. Co. v. Evans,* 712 F.Supp. 57, 58 (E.D. Pa. 1989); *Field v. Liberty Mut. Ins. Co.*, 769 F.Supp. 1135, 1138 (D. Haw. 1991) ("Section 1332(c) applies in third-party tort liability cases, where the 'insured' is the defendant-tortfeasor, not the plaintiff-victim who is suing his own insurer on a contract theory."); *Kelly v. State Farm Mut. Auto. Ins. Co.*, 764 F.Supp. 1337, 1339 (S.D. Iowa 1991) ("[U]nless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action.") (citation and internal quotations omitted); *Barton v. Allstate Ins. Co.*, 729

F.Supp. 56, 57 (W.D. Tex. 1990) ("Section 1332(c)(1) and its legislative history clearly show that an action by an insured against his *own insurer* is not a 'direct action.'") (emphasis original); *Roby v. General Tire & Rubber Co.*, 500 F.Supp. 480, 484 (D. Md. 1980) ("The within case does not constitute the type of 'direct action' referred to in the proviso clause of Section 1332(c) ... plaintiffs are suing their own insurance company ... under the terms of an uninsured motorist provision[.]"); *Ferrara v. Aetna Cas. & Surety*, 436 F.Supp. 929, 931 (W.D. Ark. 1977); *Irvin v. Allstate Ins. Co.*, 436 F.Supp. 575, 577 (W.D. Ok. 1977); *Adams v. State Farm Mut. Auto. Ins. Co.*, 313 F.Supp. 1349, 1351-52 (N.D. Miss. 1970) (discussing the legislative history of Section 1332(c)); *Bishop v. Allstate Ins. Co.*, 313 F.Supp. 875, 876 (W.D. Ark. 1970); *Bourget v. Government Employees Ins. Co.*, 313 F.Supp. 367, 370-71 (D. Conn. 1970); *Inman v. MFA Mut. Ins. Co.*, 264 F.Supp. 727, 728 (E.D. Ark. 1967).

Other courts have uniformly held that uninsured and underinsured motorist coverage is not "liability insurance" within the meaning of 28 U.S.C. § 1332(c). As the Fifth Circuit held in *Hernandez v. Travelers Ins. Co.*, 489 F.2d 721, 724-25 (5th Cir. 1974), *cert. denied*, 419 U.S. 844 (1974), after reviewing the federal case law regarding uninsured/underinsured motorist coverage, "these cases hold, correctly, that an uninsured motorist policy is not a 'policy or contract of "liability insurance."'" (Citations omitted). *Accord Tuck v. United Services Automobile Ass'n*, 859 F.2d 842, 847 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *Shief v. Tenet Healthsystem Hosp., Inc.*, No. 98-2838, 1998 U.S. Dist. LEXIS 19265, at *10-11 (E.D. La. Dec. 4, 1998); *Smith v. Zurich Am. Ins. Co.*, No. 95 - 3 004 C/W 95, 1996 U.S. Dist. LEXIS 73, at *4-5 (E.D. La. Jan. 2, 1996); *see Adams*, 313 F.Supp. 1349; *Bishop*, 313 F.Supp. 875; *Inman*, 264 F.Supp.

727.

Diversity jurisdiction in *Scott-Pontzer* cases is a subject that has divided the Northern District of Ohio. Seven Judges of the Northern District of Ohio have held that the direct action proviso operates to destroy diversity. *Reese v. Fidelity & Guaranty Ins. Underwriters, Inc.*, No. 1:01CV2633 (N.D. Ohio Mar. 22, 2002) (Oliver, J.) (App. G, pp. 47a-64a); *Butler v. Zurich Am. Ins. Co.*, 184 F.Supp.2d 695 (N.D. Ohio 2002) (Katz, J.); *Stubbins v. Nationwide Agribusiness Ins. Co.*, 181 F.Supp.2d 805 (N.D. Ohio 2002) (Carr, J.); *Estate of Jason Monahan v. Am. States Ins. Co.*, No. 5:00CV1191 (N.D. Ohio Dec. 20, 2001) (Economus, J.) (App. H, pp. 65a-72a); *Comella v. St. Paul Mercury Ins. Co.*, 177 F.Supp.2d 704 (N.D. Ohio 2001), *appeal dismissed*, 2002 U.S. App. LEXIS 5206 (6th Cir. Mar. 26, 2002) (O'Malley, J.); *Kohus v. Hartford Ins. Co.*, No. 1:01CV1179 (N.D. Ohio Nov. 19, 2001) ("If this case is considered a direct action against Hartford it will be a citizen of both Connecticut and Ohio because Hartford's insured, Plainville Ready Mix Concrete, Inc., is an Ohio corporation[.]") (Matia, C.J.) (App. I, pp. 76a, 73a-79a); *Gooden v. National Union Fire Ins. Co.*, No. 5:01CV2138 (N.D. Ohio Nov. 14, 2001) (Polster, J.) (App. J, pp. 80a-81a); *Rogers v. Kohler II*, No. 1:01CV851, (N.D. Ohio Nov. 2, 2001) (ordering the defendants to show cause why the District Court has jurisdiction) (O'Malley, J.) (App. K, pp. 82a-84a); *Kormanik v. St. Paul Fire & Marine Ins. Co.*, No. 5:01CV02122, 2001 U.S. Dist. LEXIS 23929 (N.D. Ohio Oct. 19, 2001) (Polster, J.) (App. D, pp. 12a-17a).

All these decisions are based to some degree upon on the Sixth Circuit's holding in *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421, 425 (6th Cir. 1982), where it was held that "if [the language of the direct action proviso]

encompasses other situations, we should not limit application of the amendment to the specific conditions which gave it birth. The language of the amendment is inclusive rather than exclusive[.]" This expansive interpretation of the direct action proviso has itself engendered a conflict between the Circuits. The Second Circuit has, after quoting a portion of the above passage, stated that "we decline to adopt this expansive reading of the phrase 'direct action.'" *Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 647 (2nd Cir. 1992).

On the other hand, six judges in the Northern District of Ohio have held that the direct action proviso is inapplicable where a putative insured is seeking uninsured motorists coverage from an employer's insurer. *Johnson v. Fireman's Fund Ins. Co.*, No. 1:01CV1063 (N.D. Ohio Jan. 15, 2002) (Nugent, J.) (App. L, pp. 85a-95a); *Fidelity & Guaranty Ins. Underwriters, Inc., v. Nocero*, No. 1:01CV397 (N.D. Ohio Dec. 13, 2001) ("A direct action under § 1332(c)(1) does not include an action brought by an insurer against a claimed insured for declaratory judgment as to the parties' rights and responsibilities under the UM/UIM provisions contained in a policy issued to the claimed insured's employer.... This Court is aware of, but respectfully disagrees with, the opinions issued in [*Kohus* and *Kormanik*]") (Gaughan, J.) (App. M, pp. 114a, 115a n.14, 96a-118a); *Lepley v. Hartford Accident & Indemn. Co.*,174 F.Supp.2d 656 (N.D. Ohio 2001) (finding, apparently, that the direct action proviso does not destroy diversity—the Court had earlier ordered the issue of the application of the direct action proviso briefed) (Gwin, J.); *Martin v. Liberty Mut. Ins. Co.*, No. 5:00CV1864 (N.D. Ohio Nov. 27, 2001) (Dowd, J.) (App. N, pp. 119a-120a); *Bliss v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 1:01CV2046 (N.D. Ohio Nov. 1, 2001) (holding that "National Union filed a memorandum of law in response to the [show cause] order, in which National Union

argues that complete diversity of citizenship exists. (Docket No. 9). The Court is satisfied that cause has been shown why this case should not be remanded.") (Wells, J.) (App. O, pp. 121a-122a); *Redmon v. Sumitomo Marine Management (U.S.A.), Inc.*, 179 F.Supp.2d 787 (N.D. Ohio 2001) (Aldrich, J.).

Although all of the decisions in the Northern District of Ohio that find the direct action proviso applicable have imputed the citizenship of the corporate named insured on its undisputed insurer, one judge has opined that "for the purposes of his *Scott-Pontzer* UIM claim against Chubb, [the plaintiff-employee] is an 'insured' of Chubb; thus pursuant to 28 U.S.C. § 1332(c)(1), it appears that Chubb may be deemed a resident of Ohio [plaintiff-employee's] state of residency." *Rogers, supra,* (App. K at p. 83a). But, two other judges who also have found the direct action proviso generally applicable have taken a different route, concluding only "that diversity of citizenship exists because the Defendants' [corporate named] insured" is of diverse citizenship, and ignoring the citizenship of the plaintiff who claims to be an insured. *Gooden, supra,* (App. J at p. 80a); *Fleshman v. Michigan Mut. Ins. Co.*, No. 1:01CV2389, 2002 U.S. Dist. LEXIS 9991 (N.D. Ohio Apr. 16, 2002). Currently, some judges who find the direct action proviso applicable appear to be in the process of carving out an exception to their own new rule of law—they decline to impute the citizenship of the plaintiff who claims to be an insured upon his or her putative insurer. The reason cited for this apparently contradictory and illogical distinction is that this would simply "carry [*Scott-Pontzer*] too far." *Dolly*, 2002 U.S. Dist LEXIS 9036, at *10; *Fellows-Knox v. Genesis Ins. Co.*, No. 4:01CV1929, 2002 U.S. Dist. LEXIS 8257, at *9 (N.D. Ohio Mar. 18, 2002). Again, the District Court has utilized public policy rather than law to delimit its subject matter jurisdiction.

The error of applying the direct action proviso to actions where the plaintiff is suing his or her own alleged carrier is patently obvious and creates a "new and murky jurisdictional quagmire[.]" *Villa*, 2002 U.S. Dist. LEXIS 9992, at *1 n.1. The issue presented in virtually all actions based upon *Scott-Pontzer* (or in any other action seeking coverage) is whether the plaintiff is an insured. Thus, logically, if the plaintiff wins the case by being found to be an insured of the defendant-insurer, plaintiff would also succeed, perforce, in creating another state of residence for the insurer and in destroying the subject matter jurisdiction of the District Court. This result is unavoidable because, if the direct action proviso applies, the citizenship of the putative insured (plaintiff) is imputed to the insurer (defendant).

Congress never intended such application of the direct action proviso. The direct action proviso was intended to apply only to "certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant." H.R. Rep. No. 88-1229, at 1 (1964); S.Rep. No. 88-1308, at 1 (1964). Congress indicated an intent to remove from federal jurisdiction only "tort cases involving only local residents, which in the other States [,other than Louisiana and Wisconsin, which have 'direct action statues,'] would come within the exclusive jurisdiction of the State courts." H.R. Rep. No. 88-1229, at 2. Its application to coverage disputes between insurer and putative insured was never envisaged or intended.

Thus, this Court should grant the Petition to address this conflict before insurers—and plaintiffs—across the country are expelled from the federal courts en masse in routine actions between an insured, or a putative insured, and an insurer. The

emerging line of decisions in the Northern District of Ohio represents a fundamental change in the law of diversity jurisdiction and a break with the universally accepted interpretation of 28 U.S.C. § 1332(c)(1). Further, as a simple matter of fairness and justice under Equal Protection and Due Process principles, insurers should not be deprived of access to the federal courts in one District of the United States by the random draw of one judge rather than another and then be informed that the remand order is never reviewable. The uniform application of the law is a policy favored by the framers of the Constitution and the basis of diversity jurisdiction itself.

The far-ranging implications of this issue are not difficult to imagine. Consider the AIDS patent suing a health insurer seeking coverage of a new and promising treatment or procedure. He or she resides in an area where local prejudice is strongly held against AIDS victims, as they are viewed as generally homosexual. Thus, he or she wishes to proceed in federal court. However, if uninsured/underinsured motorist coverage—which provides coverage for injuries sustained by an insured due to another's negligence—is "liability" insurance, so too is health insurance. The court in *Butler*, 184 F.Supp.2d at 699, has already held as much: "'[l]iability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, ... or in a broader sense, against *loss* or liability *on account of injuries* to property ...."' *Id.*, quoting *Aetna Casualty & Surety Ins. Co. v. Greene*, 606 F.2d 123, 126 (6th Cir. 1979) (emphasis added).

The AIDS patent would thus be denied his or her right to proceed in federal court because he or she is pursuing a "direct action" against his or her insurer on a contract of

"liability" insurance. The unintended and potential repercussions of the District Court's decision can be recounted hypothetically for many more pages, but the point is clear—the District Court's order and the Sixth Circuit' declination to review have far-ranging consequences. The Petition should be granted.

IV. Certiorari should be granted to resolve the conflict between the Circuits as to whether one has a constitutional or solely statutory right to proceed in a Court of the United States where such jurisdiction is vested by Congress.

Federal avers that it has a constitutional right to have its case tried by a court of the United States because diversity jurisdiction flows from the Constitution. There currently exist disparate holdings of this Court and conflicting holdings of the Circuit Courts on this issue. *Terral v. Burke Construction*, 257 U.S. 529, 532 (1922) (recognizing the existence of a "constitutional right to resort to the federal courts[.]"); *Bondurant v. Watson*, 103 U.S. 281, 287 (1880) ("No reason is perceived why a party to such a controversy should not enjoy his constitutional right of having his case tried by a court of the United States."). *Contra, Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

The judicial power under Article III, Section 1 of the United States Constitution "shall be vested in one supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish." The scope of the judicial power which "shall" be vested is set forth in Article III, Section 2, Clause 1 of the United States Constitution: "The judicial Power shall extend ... to Controversies ... between Citizens of different States[.]" Here, while Congress has vested the power to hear a case between citizens of different states in

the District Court, the power so vested originates in the Constitution, not with Congress. "[F]ederal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not.'" *Quackenbush*, 517 U.S. 706, 716, quoting *Cohens v. Virginia*, 19 U.S. 264 (1821).

This issue—whether the lower federal courts derive their power from Constitutional grant or act of Congress, once jurisdiction has been vested by Congress—remains long unresolved. In *Martin v. Hunter's Lessee*, 14 U.S. 304, 338, (1816), Justice Story stated that "[t]he judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction." More recently, in *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992), this Court quoted *Cary v. Curtis*, 44 U.S. 236, 245 (1845), wherein this Court stated "that 'the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress[.]'" In *Kline*, 260 U.S. at 234, however, this Court held that "[e]very [court other than the Supreme Court] created by the general government derives its jurisdiction wholly from the authority of Congress."

Thus, a conflict exists as to whether the jurisdiction of the lower federal courts "has its origin in the Constitution" or is derived "wholly from the authority of Congress," and hence whether, as this Court stated in *Terral*, 257 U.S. at 532, one has a "constitutional right to resort to the federal courts[.]" This has engendered confusion and disparate opinions from the lower courts. *See, e.g., Steckel v. Lurie,* 185 F.2d 921, 924 (6th Cir. 1950), *cert. denied*, 340 U.S. 953 (1951) ("[T]he district courts are not courts of general jurisdiction but . . . their jurisdiction is limited and their powers lie dormant until jurisdiction is

conferred by the Congress under *its* constitutional authority[.]") (emphases added.); *Mason v. Hitchcook,* 108 F.2d 134, 135 (1st Cir. 1939) (Stating that one "cannot . . . come into the District Court under the direct authority of the Constitution."); *Farrell v. Waterman S.S. Co.*, 291 F. 604, 610 (S.D. Ala. 1923) ("Congress merely creates the courts and divides or distributes the constitutional powers among them."). Based on the forgoing precedent of this Court, Federal avers that once jurisdiction was conferred by Congress, it flows from the Constitution, and accordingly, Federal's constitutional rights were violated by the District Court's remand order and the Sixth Circuit's declination of review.

The Constitutional import of diversity jurisdiction is beyond debate. The framer's intent is manifestly apparent. As this Court has held, diversity jurisdiction

> was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies ... between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. 61, 87 (1809). The basis of diversity jurisdiction, created by the Constitution, is thus intertwined with Due Process and Equal Protection

principles. Such jurisdiction is set forth in the Constitution to afford litigants a fair and unbiased hearing and equal protection under the law. Further, local prejudice to insurers in Ohio is more than theoretical. In misapplying the language of 28 U.S.C. § 1332(c)(1) and in finding that it lacked jurisdiction, the District Court violated not only Federal's right under the Constitution to proceed in a court of the United States, but also Federal's rights to Equal Protection and Due Process. The Circuit Court's limited review and analysis of the basis of the District Court's remand order represents a further deprivation of Federal's rights.

Finally, the question may be asked, cannot Congress define the citizenship of a corporation as it sees fit? The answer is two-fold and presents another issue which should be addressed by this Court: (1) first, as Congress has legislatively provided for diversity jurisdiction in this case, the District Court has simply, in conflict with other federal courts, misinterpreted and misapplied the statute; and (2) second, in finding a lack of diversity, the District Court imputed the citizenship of Federal's named insured, which has no interest in this action, upon Federal, whereas, the Constitution mandates that only the citizenship of parties with an interest in the matter in "controversy" be considered. The first issue will not be further belabored. The second requires this Court to consider its former decision on diversity jurisdiction under the Louisiana "direct action" statute. As previously mentioned, the direct action proviso was enacted to mitigate the effect of Louisiana's "direct action" statute by deeming the insurer's citizenship to be the same as its insured's. This is permissible because it is the insured tortfeasor's liability that is part of the matter in "controversy." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954) (honoring that state's characterization "of the real party in interest in federal litigation" while noting that proof of

the tortfeasor's negligence is required). However, here, the District Court considered the citizenship of a wholly disinterested party to the "controversy" in finding a lack of diversity. The citizenship of Federal's named insured—American Electric Power—was the basis of the District Court's finding of a lack of diversity. (App. B at p. 7a.) The named insured, however, will under no circumstance be liable for the uninsured/underinsured motorist benefits plaintiff seeks from Federal—such a claim arises only under the contract and only against Federal, not its named insured. The District Court recognized this fact, stating that this "is a direct action against the insurer of a company that was not even involved in the accident." (App. B at p. 7a and App. D at p. 16a.)

These jurisdictional issues remain unresolved. This Court should now pass upon them to clarify the law and provide guidance to the Circuits on these issues. Whether diversity jurisdiction is a statutory or Constitutional right where jurisdiction is vested by Congress but flows from the Constitution, whether Due Process and Equal Protection rights flow from the Constitutional presumption of local prejudice, and whether the citizenship of totally disinterested parties may be considered in determining diversity, all present issues awaiting resolution by this Court. Further, there are conflicts among the decisions of this Court and between the Circuits and District Courts on these issues; the Petition for Writ of Certiorari should be granted.

CONCLUSION

If clearly erroneous remand orders are allowed to stand with no possibility of review, District Courts may clear their dockets, just as the court in *Thermtron* did, based upon perceived policy, but evade appellate review by simply citing a

jurisdictional statute as the basis of such policy. This result removes the Constitutional protection against local prejudice and should not be endorsed. The saddest epitaph which can be carved in memory of a vanished right is that it was lost because those who possessed it failed to stretch forth a saving hand while yet there was time. *Associated Press v. N.L.R.B.*, 301 U.S. 103, 141 (1937) (Sutherland, J., dissenting).

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Gallagher, Sharp, Fulton
& Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310 - Telephone
(216) 241-1608 - Telefax
Attorneys for Petitioner.